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ABSTRACT

This update reviews affirmative action cases in higher education in the context of the Supreme Court's recent decision to hear the Michigan affirmative action cases. The Supreme Court's decision on the Michigan cases will be the first Supreme Court opinion on affirmative action in higher education since "Bakke." Individual federal circuits and districts have precedents in place that have had a chilling effect on affirmative action programs in higher education, but other circuit courts have precedents supporting diversity as a compelling state interest. Cases are described that relate to student recruitment, admissions, and financial aid. Important recent cases include "Hopwood v. University of Texas" and "LeSage v. University of Texas." The two Michigan cases, affecting undergraduate and law school admissions, are expected to be important decisions, largely because Michigan is a highly selective public institution in a state with no history of de jure segregation. Also reviewed are cases relating to the context of desegregation, participation in federal programs, faculty employment, and affirmative action in elementary and secondary education. (SLD)

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Update on Affirmative Action in Higher Education: A Current Legal Overview

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I. Introduction

Affirmative action is a source of heated legal, political and social debate, with much of the attention focused on higher education. Ever since Justice Powell's opinion in the Supreme Court's 1978 ruling in *Regents of the Univ. of California v. Bakke*, 438 U.S. 265 (1978), stated that a university could take race into account as one among a number of factors in student admissions for the purpose of achieving student body diversity, affirmative action programs in student admissions and financial aid, as well as in faculty employment, have largely been based on diversity. In recent years, however, affirmative action programs—and the diversity rationale in particular—have been challenged in cases at the universities of Texas, Georgia, Michigan, and Washington. The Supreme Court has now agreed to hear the University of Michigan cases—a decision that may be the culminating event in years of debate and litigation on this issue.

Remedying the present effects of past discrimination and diversity are the two major justifications for race-conscious affirmative action in higher education that have traditionally been recognized under the existing civil rights statutes. In recent decisions, courts have looked more carefully at the nature and weight of the evidence required to prove present effects of past discrimination, and have focused narrowly on an institution's ability to remedy effects of past discrimination within that institution only (as opposed to systemic or societal discrimination). As to diversity, courts have been looking for articulated evidence of the educational benefits of diversity, and for the connection between those benefits and the educational mission of colleges and universities. In order to address this concern, the American Association of University Professors (AAUP), American Council on Education (ACE) and other organizations developed a research instrument and surveyed faculty members with regard to the educational benefits of faculty and student diversity from their perspective as frontline educators. The results of this survey, showing significant benefits from educational diversity, were published in Spring 2000. Copies of the publication are available. The survey instrument itself is also available from ACE's Office of Minorities in Higher Education.

The Supreme Court's decision on the Michigan cases will be the first Supreme Court opinion on affirmative action in the higher education context since *Bakke*. Individual federal circuits and districts have precedents in place such as *Hopwood* and *Piscataway* that have had a chilling effect on affirmative action programs in higher education throughout the country, while other circuit courts in Washington and Michigan have precedents supporting diversity as a compelling state interest.

This uncertainty, and the legal challenges to affirmative action which continue in a variety of contexts within higher education, have created confusion and uncertainty for colleges and universities throughout the country. The cases discussed below primarily involve cases brought in federal court,

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although other complaints related to affirmative action programs have been filed in state courts, as well as with the U.S. Department of Education's Office for Civil Rights (primarily involving student issues under Title VI of the 1964 Civil Rights Act), the U.S. Equal Employment Opportunity Commission (primarily involving employment issues under Title VII of the Civil Rights Act), and other federal and state agencies. Washington State voters passed an initiative banning race-conscious affirmative in the public sector (similar to California's Proposition 209) in November 1998, Florida Governor Jeb Bush banned all use of affirmative action in admissions to state schools in 1999, and similar state legislation or action has been discussed in other states and at the federal level. In the meantime, statistics continue to show that members of many minority groups (especially African-Americans, Hispanics, and Native Americans) are underrepresented within student and faculty ranks throughout higher education, and significant barriers to equal access to higher education—such as disparities in elementary and secondary education opportunities based on the segregation of local school districts—remain.

II. Cases Regarding Student Recruitment, Admissions, and Financial Aid

Title VI of the 1964 Civil Rights Act applies to student recruitment, admissions, and financial aid programs. Some key factors in the review of such programs include the following:

(1) the use of separate procedures, tracks, criteria, or committees for white and minority students;

(2) the number and weight of criteria other than race used in such decisions;

(3) the availability of alternative, race-neutral criteria such as class and geography, and their likelihood of providing similar diversity; and

(4) the relationship of such programs to the stated educational mission of the institution, taking into account its service area and the relevant applicant pool.

The most important current cases include challenges to the procedures used at the University of Michigan for both its undergraduate and law school admissions, the University of Georgia, and at the University of Washington law school. The *Bakke* case remains the Supreme Court precedent applicable nationally on student admissions, although the Fifth Circuit's *Hopwood* decision (suggesting that Justice Powell's opinion in *Bakke*, which found that diversity could serve as a compelling interest in higher education to justify the consideration of race in student admissions, is no longer good law) has been used by some other courts to question the continued viability of the diversity rationale from *Bakke*. After the Fifth Circuit's 1996 *Hopwood* decision, the state of Texas passed legislation that permits students within the top 10% of their graduating class at all Texas high schools to be admitted to the University of Texas system. In the wake of Proposition 209, California has also adopted a plan to accept the top 4% of high school seniors in the state to the University of California system. Florida recently followed suit with the One Florida Initiative, which would eliminate the consideration of race in admissions and guarantee admission at the state's public colleges and universities to the top 20% of graduating seniors from all Florida high schools.

The U.S. Department of Education has issued policy guidance setting forth the circumstances under which race-targeted financial aid is permissible under Title VI as interpreted by the federal government. *See* 59 *Fed. Reg.* 8756 (Feb. 23, 1994). This guidance has been reiterated in light of subsequent federal court decisions and has been interpreted by the Department's Office for Civil Rights (OCR) in a number of agency findings, including a decision stating that privately funded "minority scholarships" at Northern Virginia Community College were not justified under Title VI because the College failed to demonstrate that the scholarships were needed for recruitment and retention of

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minority students, and because the college was involved in the creation of a foundation to administer the scholarships. A race-targeted financial aid program founded to remedy discrimination has also been struck down by a federal court based on the nature and weight of the evidence offered to support it. *See Podberesky v. Kirwan*, 38 F.3d 147 (4th Cir. 1994), *cert. denied*, 514 U.S. 1128 (1995) (invalidating scholarship program for African-American students in formerly *de jure* segregated state system of higher education).

There has been a concerted effort in recent years to mount reverse discrimination challenges to university admissions policies around the country. Important recent cases include the following:

A. *University of Texas* :

1. *Hopwood v. University of Texas*: The infamous Hopwood case continues to revive itself, never quite going away. The suit was first brought in 1992, when four white applicants to the University of Texas School of Law filed a case in federal district court alleging that the Law School's admissions policies were unconstitutional. Plaintiffs claimed that the Law School's policy of placing black and Mexican-American applicants in a separate applicant pool and accepting members of those groups over non-minority applicants with comparable records violated the equal protection clause of the Fourteenth Amendment. The district court held that separate evaluations for minority applicants were unconstitutional because they were not narrowly tailored to the state's compelling interest in diversity and in overcoming past discrimination. The court also held that giving minority students a "plus" is lawful, but was concerned about a separate standard for minorities and non-minorities. *Hopwood v. State of Texas*, 861 F. Supp. 551 (W.D. Tex. 1994) (*Hopwood I*).

The case was appealed to the Fifth Circuit, which reversed and remanded, expressly holding that any consideration of race or ethnicity for the purpose of achieving a diverse student body is not a compelling interest under the Fourteenth Amendment, and that *Bakke* was not controlling precedent. *Hopwood v. State of Texas*, 78 F.3d 932 (5th Cir. 1996) (*Hopwood II*). The Fifth Circuit recognized remedying past discrimination as a compelling state interest, but decided that the applicable discrimination cannot be in the system in general, or the University as a whole, but must be specifically at the Law School. Finally, the court required the Law School to show that the plaintiffs would not have been admitted under a constitutional admissions system.

The Supreme Court denied *writ of certiorari* in this case, noting that the challenged program was no longer in effect.

On remand, the district court awarded only minimal damages, finding that none of the plaintiffs would have been admitted to the Law School under a constitutional admissions process. However, the district court also enjoined the Law School from taking racial preferences into consideration in admissions. *Hopwood v. State of Texas*, 999 F. Supp. 872 (W.D. Tex. 1998) (*Hopwood III*).

Both sides appealed *Hopwood III*, and the Fifth Circuit issued an opinion on December 21, 2000. (*Hopwood IV*). The opinion is an interesting one—a decidedly mixed result. On the positive side, the court upheld the district court's conclusions that none of the plaintiffs would have been admitted even if a race neutral admissions process had been in place, and commended the district court for its careful examination of this issue. Moreover, the Fifth Circuit reversed the injunction issued by the district court, finding that an injunction barring the University from "using racial preferences for *any* reason ... impermissibly conflicts with the square holding in *Bakke*." However, the State had also asked the Fifth Circuit to overturn the first *Hopwood* decision, which the court refused to do. Citing the' law of the case" doctrine, the panel noted that it would have to find the first *Hopwood* "clearly erroneous" and a

"manifest injustice" in order to overturn it. The court then went on to note that while the first *Hopwood* panel went "beyond established Supreme Court precedent in several important respects," and employed "aggressive legal reasoning," "mere doubts about the wisdom of a prior decision" were not enough to overturn it unless it was "dead wrong." The first *Hopwood* decision did not rise to this level, the court concluded. It also noted that, while "some may think it was imprudent for the [first *Hopwood* panel] to venture into uncharted waters by declaring the diversity rationale invalid, [ ] the panel's holding clearly does not conflict directly with controlling Supreme Court precedent."

The University requested an en banc review by the entire Fifth circuit, which was denied. The case was then appealed to the Supreme Court, which denied *certiorari* on June 25, 2001.

2. *LeSage v. University of Texas* : This case involves one of the first applications of the 1996 *Hopwood* decision discussed above. (Hopwood II). In October 1998 the Fifth Circuit revived a lawsuit charging that the University of Texas at Austin discriminated against white applicants to a doctoral program in counseling psychology. Francois LeSage brought suit against the University of Texas, charging that the University's entrance criteria discriminated in favor of black and Hispanic applicants. In 1997 a federal district court judge ruled that his denial of admission had nothing to do with the University's affirmative-action policies at the time and dismissed the case. On appeal, however, the Fifth Circuit revived the lawsuit, ruling that LeSage's application "may have been affected by the use of racial preferences," and sending his case back to the lower court for reconsideration. This decision was appealed to the Supreme Court, which reversed and remanded the case on November 29, 1999. The Supreme Court concluded that since LeSage would have been rejected under a race neutral admissions policy, and since the challenged affirmative action policy was no longer in use, LeSage had no injury deserving relief under 42 U.S.C. 1983. If LeSage had sought forward looking relief, however, the Court concluded he would *not* have to prove that he would have been admitted under a race neutral program, because the relevant injury would be "the inability to compete on an equal footing." The Court remanded to the district court to resolve these issues.

3. *State Policy*: In a related development, Texas Attorney General John Cornyn has withdrawn his predecessor's 1997 legal opinion that restricted Texas colleges from offering race-exclusive scholarships. In a letter to state lawmakers, Cornyn said that his predecessor had offered too broad an interpretation of the Fifth Circuit ruling (which concerned the two-track admissions program, not financial aid or other programs).

B. *University of Michigan*:

The University of Michigan's two affirmative action cases (undergraduate and law school) have become the cases on which the issue of affirmative action in admissions will once again be addressed by the Supreme Court. The Court heard oral argument on both cases on April 1 of this year, and a decision is expected by late June of 2003. A history of the cases is below:

In the fall of 1997, two class action lawsuits were filed by the Center for Individual Rights on behalf of white students denied admission to the University of Michigan's undergraduate and law school programs. (*Gratz v. Bollinger, et al.* and *Grutter v. Bollinger et al.*) The suits allege that the University utilizes different standardized test score/grade-point average standards for white and minority students, but the University counters that race is only one among a number of factors taken into account in its admissions processes. (It has since adopted new admissions guidelines that assign points to applicants for academic and non-academic factors, including race. The University asserts that the new system maintains its commitment to affirmative action and was under development before the lawsuit. The Center for Individual Rights has faulted the new system for also making race too large a factor in admissions.) The state's efforts have been quite successful in increasing minority representation within

its programs over the past decade or so.

Both suits would hold administrators involved in admissions decisions personally liable under a federal statute (42 U.S.C. 1983) which provides recourse against persons who violate a plaintiff's civil rights "under color of law." Officials enjoy qualified immunity under that law, however, if they base their decisions in good faith on "objectively reasonable reliance on existing law." (Nevertheless, officials of Cuyahoga Community College in Ohio were held personally liable for damages in a lawsuit in which a federal court struck down a policy requiring that a percentage of the total value of College contracts be awarded to minority-owned businesses. The officials contended that they were obligated under state law to adopt a set-aside policy that benefited minority businesses, but a federal judge held that recent U.S. Supreme Court rulings striking down minority set-asides in contracting were sufficiently clear to warrant liability.)

The Michigan cases are important because the University of Michigan is a highly selective public institution in a state with no history of de jure segregation. Thus the state will have to rely on the diversity rationale in its defense rather than remedying discrimination. The Sixth Circuit ruled in August 1999, however, that black and Hispanic students can intervene in the lawsuits to argue that the university needs affirmative-action policies in place to remedy its own racial discrimination (an argument disputed by the University itself).

1. *Gratz v. Regents of the University of Michigan:* In December 2000 the U.S. District Court for the Eastern District of Michigan issued an opinion in *Gratz v. Regents of the University of Michigan*. Judge Duggan's opinion is thoughtful and encouraging, finding diversity in higher education to be a compelling interest sufficient to survive strict scrutiny, and finding Michigan's current admissions program, which treats race as a "plus" factor, to be constitutional. The court distinguished between Michigan's pre-1998 admissions program, which the court found to be unconstitutional because it reserved some slots for "underrepresented minority candidates," and the current program, which treats race as one "plus" factor of many to be considered. Finding the "plus" factor constitutional under the standard set forth by Justice Powell in *Bakke*, the court noted that "the University's interest require[s] a sufficiently diverse student body and . . . [while] fixed racial quotas and racial balancing are not necessary to achieving that goal, the consideration of an applicant's race during the admissions process necessarily is."

This opinion is a victory for both the University and affirmative action. Judge Duggan goes into great detail about the benefits of diversity in higher education, creating a very good basis on which to argue this point on the inevitable appeal. The attention to this issue also reflects the extensive work the University of Michigan has done in this case to document and support the benefits of diversity in higher education. The district court opinion is available.

The decision of the district court was appealed to the Sixth Circuit Court of Appeals, which held oral arguments before the whole court (*en banc*) on December 6, 2001. While the Sixth Circuit has not yet issued a decision, the plaintiffs in the case took the unusual step of applying to the Supreme Court for *certiorari* without an appellate decision. This action, called a Rule 11 Writ of Certiorari, allows the Supreme Court to consider the *Gratz* case along with the *Grutter* law school case (below). On December 2, 2002, the Court did just that, granting *certiorari* in both *Gratz* and *Grutter*.

2. *Grutter v. Regents of the University of Michigan:* On May 14th, 2002, the United States Court of Appeals for the Sixth Circuit issued a decision in *Grutter v. Regents of the University of Michigan*. The decision is available. (Interestingly, no opinion was issued in *Gratz*; although the cases were argued together, the court indicated that it would address *Gratz* in a separate opinion. It has not yet done so.) The court, in a lengthy and contentious 5-4 decision, found diversity in higher education to be a

compelling interest sufficient to survive strict scrutiny, and found Michigan's current law school admissions program, which treats race as one "plus" factor among many, to be constitutional. The court's decision overturned that of the district court, which had concluded that "racial classifications are *un*constitutional unless they are intended to remedy carefully documented effects of past discrimination," and that "an admissions policy that treats any applicants differently from others on account of their race is unfair and *un*constitutional." (emphasis added).

In upholding Justice Powell's decision in *Bakke*, and its endorsement of diversity as a compelling state interest, the Sixth Circuit conducted a detailed analysis of the Powell opinion and of the relative weight of the different opinions in *Bakke*. Referring to *Marks v. United States*, 430 U.S. 188, 193 (1977) and its requirement that "when a fragmented Court decides a case . . . the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds," the court read the narrow holding of Bakke to include Justice Powell's recognition of a diverse student body as "essential to the quality of higher education" and as a compelling state interest.

Of course, in order to survive constitutional review (and to not violate Title VI of the Civil Rights Act of 1964), the Law School's policy must not only serve a compelling state interest, but must be narrowly tailored to achieve that interest. The Sixth Circuit concluded that the Law School's treatment of race as a "plus" factor, and its attempts to enroll a "critical mass" of underrepresented students, did not constitute a quota system but rather was an appropriate, narrowly tailored means of achieving the racial diversity necessary to a broad education. The court paid particular attention to the fact that the Michigan admissions system (which involves reading every application individually) closely tracks the "Harvard Plan" discussed in *Bakke*. Important to the court was the fact that both the Harvard Plan and the Law School's admission's plan treat race and ethnicity as "one element among other elements," and as such do not "operate to insulate any prospective student from competition with any other applicants."

The Sixth Circuit was also not troubled by the fairly consistent percentage of minorities admitted to the law school each year, as the district court had been. Rather, the court noted that any system aiming at diversity will have some bottom and top number of admitted minorities, and that simply having an approximate range of minority students who are admitted each year does not turn the pursuit of a "critical mass" into a quota system. The court also held that the Law School's consideration of admissions recruiting activities and the idea of a lottery system for all qualified applicants was enough to find that the Law School had adequately considered race neutral alternatives. Finally, the court was not concerned by the apparent lack of a set end-point to the need for race based admissions consideration; it found the Law School's stated intention to consider race and ethnicity in admissions only until "it becomes possible to enroll a 'critical mass' of under-represented minority students through race-neutral means" to be a sufficient limitation.

Most importantly for AAUP, the court's "narrow tailoring" analysis paid particular deference to the "educational judgment and expertise of the Law School's faculty and admissions personnel." The court noted that it was ill-equipped to ascertain what race neutral alternatives will allow an institution to assemble a highly qualified and richly diverse academic class, and cited approvingly the U.S. Supreme Court's conclusion in *Regents of the University of Michigan v. Ewing* that a federal court is ill-suited "to evaluate the substance of the multitude of academic decisions that are made daily by faculty members of public education institutions-decisions that require an expert evaluation of cumulative information and are not readily adapted to the procedural tools of judicial or administrative decision making."

This opinion was a victory for both the University and affirmative action. The decision was appealed to the Supreme Court, and on December 2, 2002 the Court agreed to hear both University of Michigan cases, granting *certiorari* in both *Grutter* and *Gratz*. Oral argument was heard April 1, 2003, and a decision is expected by late June 2003.

C. ***University of Washington*:** This case involves another challenge to affirmative action for minority students in law school admissions. A white female student (Smith) sued the University of Washington in 1997, claiming that she was denied entry to the university's law school and that less qualified minority applicants were admitted over her because of the University's affirmative action policies. *Smith v. Univ. of Washington*, 2000 WL 177045 (2000). In November 1998 voters approved a state initiative to ban race-conscious affirmative action in the public sector, and the University announced that it was taking steps to suspend the consideration of race and gender in admissions. The federal district court then held that the state initiative made much of the case moot, including class-action claims seeking to declare the old admissions policy unconstitutional. However, the district court also held that the remaining discrimination claim should be decided based on principles enunciated in the Supreme Court's 1978 *Bakke* decision. The decision was appealed to the Ninth Circuit regarding the applicability of the *Bakke* principles on diversity.

On December 4, 2000 the Ninth Circuit issued a ruling upholding the district court's decision and concluding that the principles set out in the *Bakke* decision govern. Applying *Bakke*, the Ninth Circuit held specifically that "the Fourteenth Amendment permits University admissions programs which consider race for other than remedial purposes, and educational diversity is a compelling governmental interest that meets the demands of strict-scrutiny of race-conscious measures." The Washington state law banning race-conscious affirmative action in public school admissions still remains in effect, however. Thus while the Ninth Circuit's decision is a victory for affirmative action programs in general, and a great victory for the specific argument that diversity in education is a compelling state interest, the University of Washington is still barred by state law from considering race in its admissions process. The plaintiffs have appealed the Ninth Circuit decision, and on May 29, 2001 the Supreme Court denied the petition for *certiorari*, leaving the Ninth Circuit's encouraging decision standing despite its direct contradiction of the Fifth Circuit's *Hopwood* decision.

After the Supreme Court's denial of *certiorari*, the case went back down to the district court for a decision on the merits, in accordance with the Ninth Circuit's decision that the law of *Bakke* would govern. On June 5th, 2002, the United States District Court of the Western Division of Washington issued a decision concluding that the Law School's admissions policies during the years in question (1994,1995,1996) were consistent with *Bakke*, and therefore constitutional. Following the decision of the Ninth Circuit, the court considered diversity to be a compelling state interest sufficient to survive constitutional scrutiny, and thus evaluated the admissions program to see whether it met the requirement that it be narrowly tailored to meet that compelling interest. The court noted that the Law School had made a good faith effort to follow the "Harvard Plan" discussed in *Bakke*, wherein race is treated as one plus factor among many. The court also noted that "when courts are asked to review the substance of a genuinely academic decision, the Supreme Court has instructed judges to show 'great respect' for the faculty's professional judgment." Therefore, the court concluded, the Law School's admissions plan during the years in question did not violate federal law. Of course, this decision involves admissions policies in the years before the Washington state law prohibiting the granting of "preferential treatment to any individual on the basis of race" was in effect. As that state law now governs actions by schools in the state, this decision, while a good one, will have little practical effect in the state of Washington. The district court's decision is available in .pdf format.

D. ***University of Georgia*:** The University of Georgia has been the subject of numerous discrimination lawsuits, all of which have been consolidated, separated and reconsidered in such a way as to make the current legal landscape a bit of a morass. In one case, plaintiffs alleged both that the University of Georgia's past and present admissions system was and continues to be racially discriminatory because it used different admissions criteria for white and black applicants, and that policies at the state's three historically black public universities prevented "meaningful desegregation" of the state's higher education system. The plaintiffs sought to eliminate the "racial identifiability" of campuses in the state

system and the consideration of race in admissions, hiring, and other decisions. (*Wooden, Tracy, Bratcher, Harris, Jarvis, Davis and Greene v. University of Georgia*).

In January 1999 a district court judge ruled that one white male applicant was illegally denied admission in 1995, holding that the University's now-abandoned dual system (under which white and minority students were considered separately, with different criteria) was not a valid diversity-based program under *Bakke* principles. *Wooden, et al v. University of Georgia*, 59 F. Supp. 2d 1314 (S.D. Ga. 1999). At the same time, the district court dismissed the complaint of one plaintiff, a white 1997 applicant (Greene), on the basis that he lacked the necessary combination of grades, test scores, and other factors to be admitted. However, in doing so the court also criticized the university's consideration of race in admissions and stated that it appeared to be unconstitutional. The court characterized the university's goal of diversity as on shaky legal ground, calling it an "abstract concept" that changes depending on who is talking and in what context, and rejected the university's argument that racial diversity is needed to bring a greater mix of views, experiences, and backgrounds into classrooms and on the campus. Finally, in March 1999 a federal district court judge dismissed the portion of the lawsuit attacking the state's HBCUs, finding that the plaintiffs had suffered no actual injury.

Plaintiffs appealed these district court rulings, and while the appeal was pending, the Supreme Court decided *LeSage v. Texas*. In April 2000, the Eleventh Circuit remanded *Wooden, Tracy, Greene, et al.* to be considered in light of *LeSage*. *Wooden, et al., v. Univ. of Georgia*, 208 F.3d 1313 (11th Cir. 2000). The district court reviewed the case(s) and on June 16, 2000 reaffirmed its earlier decisions—a ruling which was then appealed again. On April 19, 2001 the Eleventh Circuit Court of Appeals issued yet another decision on these cases, upholding the district court's dismissal of the Davis and Tracy cases (challenging the use of race in admissions at the University of Georgia) and the Wooden, Jarvis and Bratcher cases (challenging policies at the state's three historically black public universities). (*Wooden, et al., v. Bd. of Regents* The case is available). However, the court at the same time also *reinstated* the Green case, including Green's request to be certified as the representative of a class of similarly situated plaintiffs. The district court had ruled that, because his record precluded him from being admitted, regardless of race issues, Green lacked standing to bring his case. On appeal, the Eleventh Circuit found that Green did have standing, and thus that he could possibly be a class representative, and remanded the case to the district court yet again for further consideration.

In reaching its conclusion on Green's case, the Eleventh Circuit did not address issues of diversity in higher education or the standards in Bakke. Rather, the case turned on issues of standing to proceed. In deciding that issue, the appellate court agreed with the district court that the decision not to admit Green would have been the same regardless of racial considerations. However, the court noted, Green's application had been processed through the three stages of admissions review at the University, and one of those stages considered race as one of the factors that could give an applicant extra points. Green received extra points at this stage for his parents' educational level, his Georgia residency, his SAT score, and his male gender. He did not receive extra points for race. Moreover, had he received the extra points allowable for race, he still would not have met the criteria for admission. However, because he was subjected to a stage of the process that considered race, the court concluded that he had suffered "injury" sufficient to give him standing in the case. The court also noted, however, that standing in the case only gave Green the right to "walk through the courthouse door," and that it may well be that a showing that Green's file would have been handled exactly the same if race were not a factor in the process would defeat his claim on the merits.

While the *Wooden, Tracy, Green, et al.* case was wending its convoluted way through the courts, in August of 1999 another suit was filed by a white female applicant (*Johnson*), alleging that her application was rejected because of her gender and race. Shortly after the suit was filed, the University

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of Georgia announced that it would stop giving an automatic preference in admissions to male applicants, although it is still studying the issue of whether race should be considered. However, in September 1999 three white women filed a subsequent lawsuit, charging reverse discrimination on the basis of race and gender, and sought to expand their suit into a class action. (*Bogrow, Donaldson, Beckenhauer, et al.*). The cases were consolidated, and District Judge Edenfield issued a decision on July 24, 2000 finding that the University's admissions policy was unconstitutional. The court found that there was no binding precedent on the question of whether diversity was a compelling governmental interest, and that under equal protection doctrine diversity does not rise to the level of a compelling interest because 1) there is no evidence that significant educational benefits are derived from racial and gender diversity, 2) there is no "principled stopping point" for taking race into account, and 3) that the argued compelling interest is based on stereotypes—namely the assumption that race and/or gender are a proxy for viewpoint or experience. *Johnson v. University of Georgia*, 106 F. Supp. 2d 1362 (S.D. Ga. 2000).

The case was appealed, and on August 27, 2001 the Eleventh Circuit Court of Appeals issued a decision upholding the district court decision, although for slightly different reasons. The decision is available. The court noted that to pass constitutional muster an affirmative action program must present both a compelling state interest and be narrowly tailored to meet that interest. The court then went on to conclude that it did not need to decide whether student body diversity was a compelling interest sufficient to justify race-based admissions programs in this case, because even assuming such diversity was a compelling interest, it found the UGA policy not sufficiently narrowly tailored to meet that interest.

The court's refusal to go as far as the district court in holding that diversity is not a compelling state interest is moderately encouraging. However, the court nevertheless wrote at length about the issue, and did not do so favorably. The court concludes that Justice Powell's opinion in *Bakke* is not binding precedent, and notes that while "[i]t is possible that the important purpose of public education and the expansive freedoms of speech and thought associated with [a] university environment—recognized in other decisions by the [Supreme] Court—may on a powerful record justify treating student body diversity as a compelling interest…the weight of recent precedent is undeniably to the contrary…."

The court then goes on to find that UGA's program was not sufficiently narrowly tailored to meet the interest of diversity, and delineates a set of factors to consider in such cases. Any admissions program, the court opines, must be evaluated as to whether it "(1)…uses race in a rigid or mechanical way that does not take sufficient account of the different contributions to diversity that individual candidates may offer, (2) whether [it] fully and fairly takes account of race-neutral factors which may contribute to a diverse student body, (3) whether the policy gives an arbitrary or disproportionate benefit to members of the favored racial groups; and (4) whether the school has genuinely considered, and rejected as inadequate, race neutral alternatives…." The court then discusses each of the factors in some detail, making clear that meeting these standards requires institutions to provide detailed and nuanced review to numerous factors in every application for admission; a requirement which may, for many, be a prohibitively costly endeavor.

Please also note that the UGA program was challenged both under the Equal Protection Clause of the Constitution, and under Title VI of the Civil Rights Act of 1964. The court, noting that the parties seem to see the analysis under both to be similar, decided to "discuss the issues only with reference to the Constitution." Title VI, however, covers not only public institutions, but also covers most private institutions that receive federal grants. To the extent, therefore, that this decision invalidates use of race-based admissions programs under Title VI, it extends the prohibitions on such programs to a much broader group of institutions than heretofore affected.

Finally, while Johnson was winding through the courts, two more cases were filed against the University of Georgia. *Noble v. Board of Regents of the University of Georgia* is a *Hopwood*-type challenge to the University of Georgia Law School admissions policies, and *Welsh v. Board of Regents of the University of Georgia* challenges the University admissions policies and awarding of race-based scholarships. Both cases were filed on May 23, 2000 in the federal district court of the Southern District of Georgia. However, *Welsh* was dismissed (presumably because a settlement was reached) on September 11th, 2000, and in *Noble* a settlement was reached and the case dismissed on February 7th, 2001.

E. ***University of California***

1. ***Castaneda v. The Regents of the University of California:*** In February 1999 a coalition of civil rights organizations in California filed a class action suit in federal court alleging that the admissions criteria and definition of merit used by the University of California at Berkeley disproportionately deny admission to qualified minority applicants, without adequate educational justification. The complaint cites, for example, the University's special consideration of Advanced Placement courses (which are less accessible in many minority-serving high schools) and "undue" reliance on standardized test scores. Plaintiffs requested class certification in October 1999 and then requested a stay on the lawsuit for the parties to engage in mediation.

2. ***Daniels v. State of California*:** In July 1999 the ACLU filed a class action suit on behalf of minority public high school students against the state of California and its Board of Education for failure to provide equal access to Advanced Placement courses. Plaintiffs allege that the lack of AP courses for minority students harms their secondary education and decreases their access to higher education. The case has been stayed while the parties and a team of educational experts attempt to reach a resolution.

F. ***University of Maryland School of Medicine*:** In May 1998, rejected applicant Rob Farmer brought suit against the University of Maryland in the federal district court in Baltimore, alleging that the University of Maryland School of Medicine discriminated against white applicants "by maintaining drastically lower standards for the admission of members of certain favored minority groups, especially blacks." Farmer, who eventually enrolled at a medical school in the Netherlands Antilles, alleged that his grades, test scores, and other criteria used by the University in selecting entering students were above the average of black students who were accepted for the class entering in September 1996 (for which he applied). Farmer had previously participated in an Advanced Premedical Development Program offered by the University during the summer for students from a minority or disadvantaged background.

On August 15, 2001, the district court granted the University's motion for summary judgment against Farmer. In doing so, it recognized that there was substantial evidence that the University used race as a factor in admissions. However, the district court accepted the University's argument that Farmer would not have been admitted even if race had not been a factor in the admissions decision-making. *Farmer v. Ramsay*, 159 F. Supp. 2d 873 (D. Md. 2001).

Farmer appealed to the Fourth Circuit Court of Appeals, and in August 2002 the Fourth Circuit issued an unpublished opinion upholding the district court's decision. *Farmer v. Ramsay*, 2002 U.S. App. LEXIS 15432 (4th Cir. 2002). The Fourth Circuit took as a given that race was a factor in admissions at the University, but, citing *Texas v. Lesage* (above), the court noted that "even if the government has considered an impermissible criterion in making a decision adverse to the plaintiff, it can nonetheless defeat liability by demonstrating that it would have made the same decision absent the forbidden consideration." Instead, the court noted, Farmer must be able to "show that he was displaced by beneficiaries of racial considerations." Even if Farmer's scores on entrance exams had been superior to

all admitted minority applicants, the court concluded, the evidence showed serious deficiencies in Farmer's application, giving the court no reason to doubt the university's assertion that under no circumstances would it have admitted Farmer. Farmer had also moved for an injunction barring the University from considering race in the admissions process. However, the court concluded that Farmer had failed to show the requisite threat of a concrete, particularized and imminent injury.

G. ***Oklahoma State Regents for Higher Education*:** In October 1998 a white male student at the University of Tulsa (*Pollard*) filed a class action suit against the Oklahoma State Regents for Higher Education in federal district court, challenging the legality of a scholarship program that sets different test-score requirements for members of different racial groups and for men and women. The Oklahoma Academic Scholars Program was established by state law and provides scholarships to in-state students with high test scores. In June 1999 the state eliminated the race and gender-specific features of the program.

H. ***Commonwealth of Virginia Public Universities:*** Virginia recently executed an agreement with the U.S. Department of Education Office of Civil Rights addressing affirmative action and discrimination in the state. For a discussion of that agreement, and its effects on race-conscious admissions and scholarships, please see III. F. below.

III. Desegregation Context

As was true of *Podberesky* and *Hopwood* (in Maryland and Texas, respectively), a number of recent cases have involved challenges to a variety of affirmative action measures related to attempts to carry out longstanding mandates resulting from court and agency-ordered desegregation. In *United States v. Fordice*, 505 U.S. 717 (1992), the Supreme Court held that state systems of higher education have an affirmative obligation to eliminate the vestiges of discrimination within their systems. The litigation involving the Mississippi system of higher education addressed in *Fordice* is still ongoing, and eleven states have still not been certified as officially desegregated by the federal government. Note also the following cases:

A. ***Alabama State University*:** In an effort to attract more white students to Alabama State University and Alabama A&M University, the state's two historically black institutions, a federal judge in 1995 ordered each institution to spend up to $1 million a year for ten years in new state funding on scholarships open exclusively to white students. In the 1996-97 school year, the university allegedly awarded 40% of its grant money to white students—enough to provide scholarships covering tuition, fees, room and board for nearly every white student on campus. In order to qualify, white students reputedly needed only a "C" average and a high-school equivalency. In the summer of 1997, a lawsuit was filed by the Center for Individual Rights on behalf of four Alabama State students who were not white and thus ineligible to receive a portion of this $1 million scholarship fund. The lead plaintiff (Tompkins) is a black graduate student who was denied funds from the white scholarship pool, and who claims that black students must meet higher standards in order to be eligible for grants. The scholarship program complaint has been merged with the state's broader college-desegregation case. In part in response to the suit, Alabama State University has recently raised its eligibility standards for the scholarships for white students.

B. ***University of Georgia*:** In March 1999 a federal district court judge dismissed a portion of a discrimination lawsuit in which four Georgia residents charged that policies at the state's three historically black, public universities have prevented "meaningful desegregation" of the state's higher education system. The plaintiffs had sought to eliminate the "racial identifiability" of campuses in the state system and the consideration of race in admissions, hiring, and other decisions. The dismissal was

appealed, and was upheld by the Eleventh Circuit Court of Appeals in April 2001. (For a more complete discussion of current litigation against the University of Georgia, see previous discussion.)

C. ***Louisiana State University and Southern University***: Although a 1994 agreement ended much of the litigation over desegregation of Louisiana's public institutions, a December 2000 agreement addressed the unresolved issue of how to end segregation in Louisiana State's and Southern's agricultural programs. Under the agreement, Southern, an HBCU, will now receive additional money from the state for its agricultural department and for construction, and the two institutions will collaborate on research and extension services.

D. ***Maryland Higher Education Commission***: The U.S. Education Department's Office of Civil Rights just reached an agreement with the Maryland Higher Education commission on a plan to end vestiges of segregation at Maryland's public colleges. The December 2000 plan gives the state five years to carry out different proposals designed to bolster the state's HBCUs and improve college opportunities for minority students in the state, with the hope that the state will be officially declared desegregated at that time. One of the more controversial aspects of the agreement dealt with attempts to meet *Fordice*'s requirement that states avoid offering similar academic programs at geographically close predominantly white and predominantly black institutions. The plan also calls for broadening diversity training in teacher preparation programs, increasing recruitment and retention of black students, and giving financial support to HBCUs.

E. ***University of Tennessee and Tennessee Higher Education Commission:*** The state of Tennessee reached a new settlement in December 2000 in the desegregation case that has plagued the state since the late 1960s, *Geier v. University of Tennessee, et al.* The agreement calls for the state to spend $75 million on efforts to desegregate its public colleges and improve college opportunities for black students. The plan calls for better recruitment, both of black students to predominantly white institutions, and of white students to HBCUs, as well as providing resources to strengthen historically black Tennessee State University. This settlement replaces a 1980's agreement which established racial quotas for student enrollment at Tennessee public institutions.

F. ***Commonwealth of Virginia:*** Virginia recently reached an agreement with the U.S. Department of Education Office of Civil Rights "addressing Virginia's efforts to remove the effects of past discrimination from [its] system of higher education." *Accord between the Commonwealth of Virginia and United States Department of Education, Office for Civil Rights.* After the Accord was reached the Office of the Attorney General of the Commonwealth of Virginia issued a lengthy and detailed memorandum discussing the effect of the Accord on race-conscious admissions and scholarship programs at public institutions in Virginia. That memorandum is available in .pdf format.

IV. Federal Programs

A. ***National Science Foundation***: A white male graduate student at Clemson University filed suit in federal court in Alexandria, Virginia against the National Science Foundation (NSF) for denying him a chance to apply for one of several hundred slots in its Minority Graduate Research Fellowship Program based on his race. The slots are reserved for members of groups traditionally underrepresented in science and engineering—blacks, Hispanics, Native Americans, and Pacific Islanders. The plaintiff's application for one of 2,250 other slots in the program had previously been rejected. NSF contended that its mandate for the graduate fellowship program came directly from its founding mission to strengthen U.S. science and from more recent legislation ordering it to take steps to increase the number of minorities in science. The suit was settled in June 1998, and for the future NSF is developing a single new program of graduate fellowships that will make financial awards to institutions instead of to individual students.

B. ***Other Cases*:** A similar case was settled in favor of a white female plaintiff who challenged a federal summer science camp program at Texas A&M University. The program was sponsored by the National Institutes of Health (NIH) and the Department of Agriculture (USDA) and aimed at attracting more minorities into biomedicine and health careers. Under the December 11, 1997 settlement, NIH and USDA agreed to abandon all criteria based on race or ethnicity and to pay $25,000 in legal fees. A case against NSF involving a science camp at the same University was settled in 1996, and NSF has since changed the focus to disadvantaged students. The Center for Individual Rights has supported the plaintiffs in all of these cases.

These cases are important because they involve federal programs. The Constitution grants Congress unique powers under the 14th Amendment to carry out the purposes of the Equal Protection Clause, but the Supreme Court ruled in 1995 that federal programs containing racial classifications will be subject to the same level of strict scrutiny as state and local programs. *See Adarand Constructors, Inc. v. Pena*, 115 S. Ct. 2097 (1995).

V. Cases Regarding Faculty Employment

Title VII of the 1964 Civil Rights Act applies to employment decisions (e.g., hiring, promotions, layoffs, etc.). Some critical factors used in analyzing race-conscious employment decisions include the following:

(1) the number and weight of criteria used other than race;

(2) the degree to which slots appear to be reserved as "quotas" for members of specific minority groups (which are generally illegal); and

(3) the burden placed on non-minorities by the particular type of decision (e.g., hiring v. layoffs).

A. ***University of Nevada at Reno*:** In the wake of the settlement of the *Piscataway* case, the Supreme Court declined to review another faculty employment case in which the Nevada Supreme Court upheld the University's right to consider race as a factor to diversify its faculty. The plaintiff (Farmer) had been a finalist for position in the sociology department in 1991, when the University instead hired an African-American and paid him more than the posted salary range. At that time, only 1% of the University's faculty members were black, and the University maintained a "minority bonus program" that allowed a department to hire an additional faculty member if it first hired a minority. One year later, the sociology department filled the additional slot created by the minority bonus program by hiring the plaintiff. She was offered $7,000 less per year than the black male when he was hired.

The white female plaintiff filed a suit claiming that the University violated the Equal Pay Act by paying her less than a comparably qualified male peer, and the Civil Rights Act by basing its hiring and pay decision on race. The Nevada Supreme Court overruled a jury verdict in favor of the white plaintiff, relying on *Bakke* to find that Nevada-Reno had a "compelling interest in fostering a culturally and ethnically diverse faculty. . . . A failure to attract minority faculty perpetuates the university's white enclave and further limits student exposure to multicultural diversity." *University and Community College System of Nevada v. Farmer*, 930 P.2d 730 (Nev. S. Ct. 1997), *cert. denied*, 523 U.S. 1004 (1998).

B. ***Columbia University*:** In December 1997 the Second Circuit reversed a lower court and ordered a jury trial to review charges that Columbia University discriminated against an instructor because he was

not of Hispanic descent. *Stern v. Trustees of Columbia Univ. in the City of New York*, 131 F.3d 305 (2d Cir. 1997). The plaintiff, who had taught Spanish and Portuguese at Columbia since 1978 and even served as interim director of the University's Spanish language program for two years, was allegedly not seriously considered for the permanent directorship because he is a white male of Eastern European descent. The University claimed that though the plaintiff was a finalist for the position, it chose another candidate based on qualifications, not bias. The person who was hired is described in court papers as an American of Hispanic descent. The plaintiff alleges that this individual had not yet earned his Ph.D, had less teaching experience and had written less extensively than the plaintiff, and was not proficient in Portuguese. The search committee at Columbia asked each of three finalists (including these two) to teach "tryout" classes, and found that the candidate they selected "mesmerized" the class while the plaintiff's teaching was weak.

C. ***Hill v. Ross*:** The Seventh Circuit held that a state university may not require that each department's faculty mirror the sexual makeup of the pool of doctoral graduates in its discipline. The court found that such a policy is not narrowly tailored to remedy past sexual discrimination and violates Title VII. The suit was brought by a male psychology professor, recommended for a tenure-track position, whose appointment was blocked because a dean said that the department "needs 3.23 women to reach its target" of 62% women in the department. *Hill v. Ross*, 183 F.3d 586 (7th Cir. 1999).

D. ***Honadle v. University of Vermont and State Agricultural College*:** In June 1999 a federal district court ruled that the University of Vermont's minority faculty incentive fund, to the extent it functioned as a racially conscious inducement for departments to recruit minority faculty members, did not create a racial classification subject to strict scrutiny. However, the court also held that the program would violate equal protection to the extent that it were found to function as an inducement to hire minority applicants based on their race. *Honadle v. Univ. of Vermont*, 56 F. Supp. 2d 419 (D.Vt. 1999). (In September 2000, the same court denied the University's summary judgment motion, finding that the university was not entitled to Eleventh Amendment immunity.)

E. ***Federal Regulations*:** The Office of Federal Contract Compliance Programs in the Department of Labor has also just issued regulations, effective December 15, 2000, governing affirmative action programs for government contractors. The regulations govern affirmative action plans and obligations for institutions contracting with the federal government for amounts equal to or greater than $50,000. *See* 41 CFR Part 60-1, 60-2. While educational institutions are exempted from some of the new requirements, the new regulations still impose more stringent tracking requirements mandating greater attention to affirmative action in hiring and promotion.

VI. Elementary and Secondary Education

The battle over affirmative action in the education arena is also being waged at the elementary and secondary school levels. As in higher education, many of the cases have arisen in states and school districts that have struggled for years with court-ordered desegregation.

A. ***Boston Latin School (Wessman v. Boston School Comm.)*:** Prior to November 1996, Boston's public schools were committed to an affirmative action admissions program for minority students who applied to the city's top three public high schools: Boston Latin, Latin Academy, and the O'Bryant School of Science and Mathematics. The policy required the schools to give 35% of their slots to black or Hispanic students. In 1996, a white student who was denied admission to Boston Latin filed a discrimination lawsuit in federal court. The school chose to drop its minority admissions program, and the suit was dismissed. Under a restructured admissions plan, the three schools admitted 50% of applicants based solely on test scores and grade-point averages, and the remaining 50% in proportion to

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